No. 15066

IN THE

United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Resisting Appeal from the United States District Court for the Judicial District of Arizona

JACK D. H. HAYS
United States Attorney
for the District of Arizona
204 U. S. Court House
Phoenix, Arizona

ROBERT S. MURLLESS
Assistant United States Attorney

Attorneys for Appellee

McGREW PRINTERY, PHOENIX, ARIZONA

TABLE OF CONTENTS

TABLE OF REFERENCES TO THE CONSTITUTION OF THE UNITED STATES

TABLE OF STATUTES CITED

TABLE OF CASES CITED

No. 15066

IN THE

United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Resisting Appeal from the United States District Court for the Judicial District of Arizona

DESCRIPTIVE STATEMENT OF CASE

1. Jurisdictional Statement

The United States District Court for the Judicial District of Arizona had jurisdiction hereof under *Title 18, United States Code, Section 3231,* and the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction hereof under *Title 28, United States Code, Section 1291.*

2. Opinion

There was no written opinion of the trial court. This is the second appeal of this defendant (particularly on alleged Specifications of Error Nos. 3 and 4). The instant appeal is from an order denying Motion for New Trial alleging newly discovered evidence.

**Transcript of Record (15066) pp. 18, 19 and 20*

This is the second Motion for a New Trial on Newly Discovered Evidence made to the trial court. The first was made prior to December 20, 1954.

T. R. pp. 9, 10, 11, 12 and 13

The testimony, taken on above mentioned Amended Motion for New Trial on Newly Discovered Evidence, contained substantially all assertions made in the present motion. This prior Amended Motion was made, pending appeal. It was denied December 20, 1954, without opinion.

T.R. p. 16

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, in *appeal No. 14536,* which is the law of this case with respect to two of the Specifications of Error and grounds for appeal (c.f. Appellant's Brief, pp. 10 and 11) is contained in *226 F. 2d 185 et seq.*

c.f. *Bloch vs. United States, Oct. 12, 1955, id.*

3. Statutes Violated

The appellant was charged in an indictment containing eight counts. This indictment charged illegal acquisition of and sale of narcotic drugs. *26 U.S.C.A.*

**Unless the context indicates otherwise, the Transcript of Record, Court of Appeals No. 15066 will be indicated by the use of T.R. followed by a number indicating the page referred to. When further clarity requires, the Circuit Court of Appeal numbers, that is, either 15066 or 14536 (the prior appeal) will be specified.*

2554(a) (sale); 2554(g) (acquisition); I.R.C. 1939.

T.R. (14536) pp. 3, 4, 5 and 6

The two counts of the indictment alleging violation of *Section 2554(g), Title 26* U.S.C.A., were dismissed in advance of trial.

T.R. (14536) p. 17

The defendant was a medical man, an osteopath, and the counts of the indictment upon which he stands convicted alleged the sales of narcotic drugs "not pursuant to the Treasury Department Order Form . . . not pursuant to a prescription . . . and not in the course of the professional practice . . . (of this doctor) . . . ".

For the convenience of this court the following statutes are cited or set forth, in pertinent part, verbatim:

"Section 2554. Order forms—(a) *General Requirement.* It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary . . .

"(c) *Other exceptions* . . .

"(1) *Use of drugs in professional practice.* To the dispensing or distribution of any of the drugs mentioned in section 2550(a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided,* . . .

"(2) *Prescriptions.* To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550(a) by a dealer to a consumer under and in pursuance of a written prescription issued by a

physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however, . . .*"

Title 26 U.S.C.A., 2554

It will be noted that there are references, in the statute above cited, to *Sections 3221 and 2556, Title 26 U.S.C.A.* It will be further noted that *Section 3221, supra*, refers to *Section 3220,* infra. The last two mentioned Sections relate to *Chapter 27, Internal Revenue Code, Special Occupational Taxes, Narcotics. Section 3221, supra,* which requires registration of persons engaging in the Special Occupations designated in *Section 3220: Title 26 U.S.C.A. Section 3220* imposes a special tax upon wholesalers, dealers and physicians who deal in narcotic drugs.

This appeal is prosecuted under *Title 18 U.S.C.A., F. R. of Crim. P. 33,* and under the provisions of *The Constitution of the United States of America, V Amendment.*

4. Issues on Appeal

We believe this appeal is notable principally for its violence of language. Principal issue is the validity of the assertions of perjury and suppression of evidence *(T.R. pp. 18, 19 and 20; Specifications of Error I and II, Appellant's Brief p. 10).* On these assertions is founded argument that there was: (1) Misconduct of counsel; (2) Abuse of trial court's discretion, in refusing new trial on alleged newly discovered evidence (suppressed and falsified at trial); and (3) Therefore a deprivation of liberty without due process of law *(V Amendment of The Constitution of the United States).*

5. Pages of Transcript of Record upon which Appellee Relies in Resistance of This Appeal.

Appellee relies upon the pages of *Transcripts of Record (both 15066 and 14536)* cited in the following paragraphs, together with those cited in *Statement of Facts—Corpus Delicti, paragraph 5, Brief of Appellee (14536), pages 6, et seq.*.

INTRODUCTION TO ARGUMENT

It is not believed necessary nor proper, in the face of the allegations of reprehensible malfeasance (accorded to government counsel and government agent), to urge that the alleged perjury and suppression does not involve material facts. However, perfection in investigation and prosecution is not expected of counsel for the government, nor of government narcotics agent. It is necessary therefore to examine the testimony at the trial *(T.R. (14536))*, to establish whether or not there was any significant suppression or falsification. We ask that this Court take judicial notice of the files and records in *Bloch vs. United States of America, Ninth Circuit, Court of Appeals No. 14536.*

ARGUMENT

1. Alleged Suppression of Testimony (Specification of Error No. 1).

Specification of Error No. I *(Appellant's Brief, page 10)* accuses government counsel of " . . . suppression of testimony . . . ". " Suppresion of Testimony" is sometimes (and was in this case we believe) the duty of a conscientious government counsel. A stigma is cast where it is shown that there has been a suppression of *evidence;* there is no stigma attached to the suppression of testimony of the usual narcotic addict. His testimony is not necessarily evidence.

The testimony that Gilbert Hernandez was an addict is not controverted.

T.R. (14356) p. 275 (Policeman Welch), 183; (15066) p. 26.

The testimony that an addict respects nothing but his addiction and his misery is not contradicted.

> " . . . The symptoms are very acute and rather extreme, driving the individual to almost any limit in order that he may receive relief. It might be said that drug addiction is really a continued process of seeking relief from withdrawal of the drug. The symptoms deprive a man almost of his reason, and they are responsible in many instances for many crimes, in an attempt on the part of the addict to secure his drug. You might say that the life of an addict is devoted to one thing, and that is assuring a constant supply of his drug . . . "

T. R. (14536) p. 254 (Dr. Meyers)

The testimony of such a person could not reasonably be expected to contribute to truth. Neither would such testimony be reliably credible nor cumulative, to support the credibility of other witnesses. This is further demonstrated by the fact that Hernandez was in court, on the days of the trial, and defendant could not rely upon his testimony, and refused to call him or subscribe to his testimony.

T.R. p. 42

Defendant and his counsel were willing to talk to this addict, (two years under defendant's ministrations) if not surreptitiously, still at the convenience of the witness and not at the convenience of the government (whose agent he had been).

T. R. (15066) pp. 35, et seq. (W. Church, Attorney at Law) and pp. 30, et seq. (Hernandez)

The testimony of this man could not be relied on, as a contribution to truth, nor as a contribution to evidence.

Suppression of testimony is not suppression of evidence; no blame nor stigma should attach, as in this case, where incredible, incompetent and/or unreliable testimony was not brought before the court.

2. Alleged Suppression of Evidence.

Assuming, arguendo, that the testimony of Hernandez would have been competent, it is still submitted that there was no suppression of evidence. The principal objection, or assertion of perjury or suppression, is directed to Mr. Cantu's statements that he stated to appellant, at the time of the purchases of narcotic drugs, that the narcotics were for his "girls" (prostitutes). But, appellant testified to substantially the same thing (that Mr. Cantu described himself as a whoremaster):

" . . .

Q. Did you ever give him any injections at all in your office?

A. No, I never have . . .

A. . . . It was at that time he told me—I asked him what he did for a living; and he told me, he showed me his hands and says, 'I never did a day's work in my life.'

I said, 'How do you support yourself?'

He says that he had a young married woman who was married to an elderly man supporting him. He told me that her husband was not capable of satisfying her sexually, so he took over, for which she took care of him. And he wanted

. . .

A. He also said that he had three girls working for him at the Arizona Manor, and that he took care of these girls, too. He was a great lover. I asked him what he had that was so wonderful. He said he just was a good man.

Q. Now, did he ever represent to you that these girls were engaged in an occupation of ill fame?

A. He told me these three girls that he had working for him were at the Arizona Manor, but at no time did he ask me for narcotics for them.

Q. He never asked you for narcotics for the girls?

A. No. That was on his own. He just offered this information by himself. I asked him how he made a living, and he said that—he actually spread his hands out to indicate that he had no callouses on them, never worked a day in his life . . . "

T.R. (14536) pp. 198 and 199

" . . .

Q. Did he ever tell you, Doctor Bloch, that he wanted this for three prostitutes, that were addicts?

A. No, sir, he never said that at any time. He never mentioned anything about prostitutes until the following visit, the one after that.

Q. You mean the visit on November 10, 1953?

A. That is right . . . "

T.R. (14536) p. 194

The verity of the above testimony of appellant is most seriously questioned upon consideration of the following compilation of the various sales of narcotic drugs (note; reference to November 10, 1953, above, and purchases on October 29 and 30, 1953, in following schedule): (All *Transcript of Record* references are to *C. A. Ninth Circuit 14536):*

"3"—September 23, (T.R. p. 96), morphine solution (T.R. p. 46), approximately one cubic centimeter (T.R. p. 46), no quantitive analysis (T.R. p. 73);

"4A"—September 24, (T.R. pp. 100, 101), morphine solution (T.R. pp. 51, 54), approximately 10 c.c. volume (T.R. p. 74), containing one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for $40.00 (T.R. p. 101);

"5A"—October 29, 1953 (T.R. p. 103), morphine solution (T.R. pp. 54, 104), 20 c.c. (T.R. p. 68), one-eighth grain of morphine per cubic centimeter (T.R. p. 74), for $30.00 (T.R. p. 105);

"6A"—October 30, (T.R. p. 105, et seq.), morphine solution (T.R. p. 58), 15 c.c. (T.R. p. 67), one-quarter grain morphine per cubic centimeter (T.R. p. 75), in connection with government's exhibit "6B" below, purchased for $40.00;

"6B"—purchased at the same time as exhibit "6A", derivitive of opium (T.R. p. 58), two tablets (T.R. p. 106), purchased for $20.00 (T.R. pp. 106, 107);

"7A"—November 10 (T.R. p. 111), morphine solution (T.R. p. 60), 30 c.c. (T.R. p. 67), one-sixteenth grain of morphine per cubic centimeter (T.R. p. 75), for $80.00 (but with a credit for 10 cubic centimeters more) (T.R. p. 111);

"8A"—November 16 (T.R. p. 112), morphine solution (T.R. p. 64), 8 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 75), the execution of the

credit for 10 c.c. of morphine solution mentioned in reference to "7A", above, which was purchased for $80.00 (T.R. p. 112);

"9A"—November 19 (T.R. p. 113), morphine solution (T.R. p. 65, 66), 20 milliliters, or 20 c.c. (T.R. p. 67), one-eighth grain of morphine per cubic centimeter (T.R. p. 76), sold to agent Cantu for $50.00, of recorded money (T.R. 115).

In a period of less than 60 days, approximately 104 c.c. of morphine-atropine was purchased, in quantities ranging from one to thirty c.c. In the 48 hours of October 29 and 30, 35 c.c. of morphine-atropine was purchased together with two one-twentieth grain tablets of dilaudid. The purchases pursuant to the foregoing schedule are not to be presumed to be for the consumption of a single person.

The purchases of these quantities of two deadly poisons, at the times and in the amounts above set forth, is presumed to be for the consumption of some persons other than an ambulatory (alleged) narcotics addict. Furthermore, the testimony was that a confirmed drug addict concerns himself only with the misery of today; he does not store up drugs for use at another time:

". . .

Q. Now, you state the withdrawal. What do you mean by withdrawal?

A. Well, morphine or any of the narcotics produce in the individual a condition which demands a continued use of the drug. In fact, if the drug is not constantly supplied the individual will then suffer certain symptoms.

The symptoms are very acute and rather extreme, driving the individual to almost any limit in order that he may receive relief. It might be said that drug addiction is really a

continued process of seeking relief from withdrawal of the drug. These symptoms deprive a man almost of his reason, and they are responsible in many instances for many crimes, in an attempt on the part of the addict to secure his drug. You might say that the life of an addict is devoted to one thing, and that is assuring a constant supply of his drug . . . "

T. R.(14536) pp. 253 and 254

To summarize, briefly; the perjury and suppression assertions, contained in Appellant's Brief and in his Motion for New Trial, are not supported by the multitude of circumstances to be found in the Transcript of Record of the trial. These assertions degenerate into a question of quantum of testimony (1) as to whether the drugs were supposed to be for Mr. Cantu's "girls" or for someone else to whom he was supplying drugs; and (2) whether reference to the "girls" was made on Mr. Cantu's first trip, his second or his third trip: At best, a sorry basis on which to claim perjury.

The manner in which Mr. Cantu testified concerning the references to the "girls", clearly demonstrates that he was telling the truth, and that the appellant's recollection was faulty, or false. This is by reason that, on Mr. Cantu's first testimony concerning the "girls", he testified in the manner of a man who has omitted the obvious; he went back and cleared up something that he had forgotten to state, because in generality it was obvious, or because in specificity it wasn't important in the first place:

" . . .

A. I saw him again October 29th.

Q. And under what circumstances?

A. Well, it was following orders, and I telephoned him before I went out to his office, and he said it was all right for me to come out.

I walked into the office, and this Miss Woods, I presume her name is Miss Woods, met me in the reception room.

I asked for the defendant Bloch, and she said that he was in his private office, for me to walk in.

I walked in, and he greeted me, and I told him I would like to have some more of that medicine that we had got previously from him.

And he told me that was a morphine something, I don't know whether he said morphine sulphate, or morphine something.

So we had talked about what I was using it for, and he asked me if the girls had liked it. I was supposed to be giving this narcotic to some girls I had working in a resort hotel, and I said they didn't like it very much, that they would rather have dilaudid.

In the meantime, I got my money out, and I gave him $30, and he motioned me towards the same back room, and I went with him, and by means of a hypodermic needle he extracted some solution from a bigger bottle, and I noticed the big bottle was marked 'Morphine.' "

T.R. (14536) pp. 102 and 103

It is notable that this is the first time in the trial that Mr. Cantu testified concerning the "girls". He did so almost as an after thought, after an omission of the obvious. It is notable that this is the only time, on direct examination in the case in chief, that Mr. Cantu testified about the "girls". Apparently the importance of this testimony was not appreciated by either government counsel or government agent. Nowhere is there any testimony supporting the present affidavit of Hernandez, that the narcotic drugs were being sold to Cantu for the use, also, of Hernandez.

T.R. (15066) p. 30

Omission of the testimony of Hernandez, from the government's case in chief, was not the suppression of evidence; if it was the suppression of anything, it was the suppression of incompetent and confusing testimony, even if it is assumed that the narcotic addict, Hernandez, would have testified at the trial in accordance with his affidavit made almost two years later. It is apparent from the consideration of these further circumstances, and of the testimony *(T.R. 14536),* that there is not any perjury in this case. *(c.f. Paragraphs infra).*

Alleged Perjury.

The foregoing paragraphs are cited to the proposition that Hernandez's testimony would have been incompetent. They also establish, we believe, that no one could nor can tell what his testimony would have been, had he been sworn as a witness. We urge that the rambling nature of Hernandez's affidavit *(T.R. (15066) pp. 26-34)* demonstrates the incompetence, the irresponsibility and the unreliability of his testimony.

As examples of the demonstration of incompetence, irresponsibility and unreliability, may we call the court's attention to the following assertions *(Affidavit of Hernandez, T.R. (15066) pp. 26-34):* He states that he is an addict: That he was given *an injection by hypodermic needle* by appellant on September 23, 1953 (in accordance with previous practice): That the drugs purchased were purchased on the promise that they were for Mr. Cantu and for Hernandez: And, that " . . . During the course of the trial . . . the affiant was secluded in a room in the Federal Building in the City of Phoenix . . . "

We submit that the assertions run the gamut, from the truthful to the fantastic.

Nowhere is it controverted that he was an addict, at the time of the trial. On the other hand, the rooms in the Federal Building in the City of Phoenix are public offices, under the custody of United States District Judge of the District of Arizona: Hernandez admits, furthermore, that he was sworn as a witness in a trial before that judge: He could not have been secluded in the Federal Court House Building. It is notable that he does not state the circumstances of this seclusion, nor the persons responsible therefor, assuming that he was not in the sole custody of the Court (in his witness status).

There was no perjury in the case. During negotiatiations for seven purchases, for a sum of money in excess of $200, it is presumed that the persons would talk about something. One of the principal subjects suggested for conversation would be the quality of the product sold, and the satisfaction of the consumers. Mr. Cantu's testimony of the conversations is consonant with the circumstances surrounding the purchases. He told the truth to the best of his ability. Appellant-defendant makes no endeavor to describe the general tenor of these conversations, though he remembers portions of them with much more particularity than did Mr. Cantu (c.f. *T.R. (14536) pp. 198 and 199 quoted supra).*

The assertion of perjury is irresponsible, and is founded on false affidavits.

From the foregoing paragraphs, Nos. 1 and 2, it is apparent that there was neither suppression of evidence nor perjury. Gilbert Hernandez's testimony was incompetent and unreliable. Mr. Cantu testified as a

man who had omitted the obvious, when he first testified concerning the "girls". Government counsel could not be guilty of suppression of evidence, when there was such grave doubt that it would be evidence, much greater doubt that it would be credible. We believe that no one could tell, at the time of the trial, what the narcotic addict would testify to. Appellant knew the truth; he treated Hernandez for two years; he was in a better position, to know what the testimony would be, than was anyone else.

Defendant-appellant testified that there were references to "girls". He was present at the conferences or conversations. There was no omission of the conflict in evidence. It appears that the refusal of the government to call Hernandez was the subject matter of much of the argument of counsel to the jury.

T.R. pp. 66, 72 and 73

The remedy available to defendant-appellant, knowing (so he says) what the truth of the matter was, and to what Gilbert Hernandez would testify (if competent and reliable), was to call Gilbert Hernandez, who was in attendance upon the court; then claim surprise, if the testimony was not as it was expected to be, and seek the court's approval for the cross-examination of an adverse witness, on grounds of the alleged critical nature of the surprise testimony, and government's failure to call the witness.

As Judge Denman said in *Brandon vs. United States, infra*:

> "One cannot withhold such evidence at the trial, and, being convicted, seek a second chance before another jury by then producing it . . . "

Brandon vs. United States, 1951, 190 F. 2d 175, 178

cf. Wagner vs. United States, 9th Circuit, 118 F. 2d 801, 802

cf. Johnson vs. United States, infra.

Cases cited by appellant do not support the propositions, as applied to this case, that there was perjury, that there was suppression of evidence (amounting to misconduct), nor that there was an abuse of trial court's discretion. Principally appellant's Brief contains cases where default judgment was obtained allegedly by extrinsic fraud. In none of appellant's cases was the testimony (which was not adduced) that of a witness who was incompetent or unreliable.

It is not extrinsic fraud for government counsel to refuse to call to the witness stand a witness of questioned competence, questioned credibility, or questioned reliability. For example:

> " 'Obviously, he (Chin Poy) is a person whom a jury would disbelieve.' Doubtless that is why the government did not call him at the trial; and doubtless, for the same reason, the government would not call him if there were a new trial."
>
> *United States vs. On Lee, 2d Circuit, 1953, 201 F. 2d 722 at 725*

It is notable that the above indicated case *(On Lee)* went to the Supreme Court of the United States twice: (1) *345 U. S. 936,* cert. denied. *(201 F. 2d 722),* and (2) *343 U. S. 747* (opinion on writ of certiorari to *193 F. 2d 306).* In none of the opinions (including dissents) is it held that the circumstances (generally like those complained of in the instant case) constitute extrinsic fraud.

3. Alleged Newly Discovered Evidence.

Proposition of Law No. 1 The granting of Motion for New Trial, on alleged newly discovered evidence, rests in the sound discretion of the trial court.

In a narcotics prosecution, speaking for the United States Court of Appeals for the Ninth Circuit, Judge Dietrich had this to say:

> " . . . One of the grounds upon which defendant moved for a new trial was newly discovered evidence, supported by numerous affidavits which in the main assail the character and credibility of one of the government witnesses and tend to show that she was untruthful in some of the testimony she gave. Generally the granting or refusing of a new trial is within the discretion of the court; and new trials upon this ground are not favored. Under the circumstances, defendant must have known or had good reason to anticipate that his witness would testify for the government, but there is no showing at all of diligence. The alleged false testimony was brought out on cross-examination as to matters purely incidental and collateral. Upon the whole, while the showing against the credibility of the witness is persuasive, we cannot say that there was an abuse of discretion in denying the motion upon this ground . . . "
>
> *Casey vs. United States,* 9th Circuit, 1927, 20 F. 2d 752 at page 754.
>
> *cf. Brandon vs. United States, 9th Circuit, 1951, 190 F. 2d, page 175*

As distinguished from *Casey vs. United States* (*supra*), in the present case we believe that, upon the whole, the showing against the credibility of the witness is *not* persuasive. Even though it was stated to be persuasive, in that case, still it was held that there was no showing of abuse of discretion.

The above Proposition of Law does not seem to be controverted, as a general rule. Neither is its corollary, as stated by Judge Dietrich, to the effect that Motions for New Trial on the ground of newly discovered evi-

dence are not looked upon with favor by courts of appeal. This latter ruling is particularly applicable to the circumstances of the instant case. Here appellant seeks to impose upon the government liability for failure to call an irresponsible witness.

cf. Johnson vs. United States, 8th Cir., 32 F. 2d 127

United States vs. On Lee, supra.

There was no abuse of discretion in the Denial of Motion for New Trial under the circumstances of the case at bar.

Proposition of Law No. 2 To require the granting of Motion for New Trial, for newly discovered evidence, there must ordinarily be present and concur five verities, to-wit: (a) The evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) Facts must be alleged from which the court may infer diligence on the part of the movant; (c) The evidence relied on, must not be merely cumulative or impeachment; (d) It must be material to the issues involved; and (e) It must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

The above Proposition of Law is taken verbatim from the case *Brandon vs. United States, 9th Circuit, 1951, 190 F. 2d 175 at page 178.* It is notable that it is a quotation by Judge Denman, from the case *Johnson vs. United States, supra,* which has been quoted with approval by this court many times.

In the present case, admitting the materiality of the issue involved, it is demonstrated in the circumstances of the case, and in the testimony at the trial thereof, that the evidence is merely cumulative or impeaching,

and that it is not newly discovered, i.e., discovered since the trial: For example; no one denies but that Bernard Bloch was a party to the conversations concerning the "girls". The defendant-appellant sought the statement of the addict, Gilbert Hernandez, in advance of trial. Gilbert Hernandez was in the courtroom during the trial. Defendant-appellant could have called Gilbert Hernandez, and if surprised by his testimony, could have impeached him upon cross-examination, after a request to the court.

It affirmatively appears that each of the assertions of the affidavits is either incompetent, irrelevent (or both) or that it is not *newly discovered*, with the possible exception of the allegation that Hernandez was confined during trial in a room in the Federal Court House Building. This is the only allegation of something that can qualify as *newly discovered*. This assertion was put in issue by affidavit.

T.R. (15066) page 42

It was not abuse of discretion to refuse a Motion for New Trial, founded upon alleged newly discovered evidence, of questionable competence, put in issue by affidavit.

c.f. United States vs. *Marachowski,*
7th Cir. 1954, 213 F 2d 235

Casey vs. *United States, supra*

May we quote from one more of the many cases, where in circumstances like the case at bar, it is held that it is not abuse of discretion, to deny motion for new trial, under *Rule 33*.

" . . . After the appeal had been taken in this case the appellant made application to this court to remand the case to the District Court for the purpose

of enabling it to entertain a motion for a new trial on the ground of newly discovered evidence. Pursuant to this petition we remanded the case and an application for a new trial on the ground of after-discovered evidence was made and heard by the court below. The after-discovered evidence relied upon, however, was not as to the facts at issue in the case, but was merely evidence affecting the credibility of the defendant Haynes who testified for the Government. It consisted of testimony as to statements alleged to have been made by Haynes while confined in prison that he had received certain inducements to testify in favor of the Government. The witness who supplied this evidence was himself an inmate of the same prison with a record of five convictions of felonies. He was obviously himself of very doubtful credibility. The court below after considering the after-discovered evidence refused a new trial and upon a re-argument adhered to this action. We are satisfied that it did not abuse its discretion in so doing.

Judgment affirmed."

Goodman v. United States, Third Circuit, 1938, 97 F. 2d 197, at p. 199

It was not an abuse of discretion to refuse to grant Motion For New Trial on Newly Discovered Evidence, where the newly discovered evidence was by affidavit of a material witness, of questionable competence, whom government counsel failed to call to the witness stand, and whose testimony, if it were evidence, would have been only cumulative and/or impeaching.

Prior Conviction Reversed-Entrapment.

Early in November of 1953, the defendant was on trial for alleged Federal income tax evasion. On November 9, 1953, the jury returned a verdict of guilty of one count, not guilty of the other count, in that income tax evasion case. Judgment and commitment on

said verdict was appealed to this court, and reversed on April 11, 1955.

Bloch vs. United States, April 11, 1955, Ninth Circuit 221 F. 2d 786; Rehearing Denied 223 F. 2d 297 (June 14, 1955)

In *Ninth Circuit Court of Appeals No. 14536 (226 F. 2d 185),* the first appeal in the instant (Narcotics) prosecution, argument was had on the 23rd day of September, 1955. Though the defendant-appellant represented to the Supreme Court of the United States, in Petition for Rehearing From the Denial of the Petition for Writ of Certiorari and Motion to Recall Mandate, filed in the instant case, that this court's attention had not been specifically drawn to the fact of the reversal of the conviction in the tax case, we believe that the reversal of the conviction in the tax case is not *newly discovered evidence*, to require a relitigation, on appeal, of the determination of this court.

It seems to the writer, that all significant aspects of the specifications of error numbers III and IV, concerning the reversal of the conviction in the tax case, and the asserted defense "entrapment", are closed by the decision and opinion in *Bloch vs. United States, 226 F. 2d, 185.* The following quotations, from that opinion, seem to be the rule of law applicable to the two alleged specifications of error, Nos. 3 and 4, contained in Appellant's Brief, pages 10 and 11 thereof.

> " . . . As we read the applicable decisions we do not hesitate to say that . . . the Assistant United States Attorney . . . could very reasonably conclude that the question was proper and be well within the bounds of propriety in asking it.
>
> Counsel representing appellant at the trial must have thought the question proper because he made no objection to it, nor did he move to strike . . .

Appellant says he was entrapped. We see no merit in this contention . . .

Judgment affirmed . . . "

Id., 226 F. 2d, p 188, et seq.

CONCLUSION

There was no perjury in this case: And suppression of testimony is not suppression of evidence. Even the Government may choose between witnesses, on the bases (amongst other bases; individually or together) of the relative credibility or competence of the witnesses.

The granting or denial of Motion for a New Trial is within the discretion of the trial court. It is highly improbable, if not impossible, that the questioned testimony of the addict would change the result *(c.f. Verdict, T.R. (14536) p. 22)* in this case.

Where affidavit, in support of Motion for New Trial on the grounds of Newly Discovered Evidence, is controverted in its only assertion which could be considered newly discovered, and where that allegation is, in the nature of things, highly improbable if not impossible, then denial of Motion for New Trial is not an abuse of discretion.

Judgment should be affirmed.

Respectfully submitted, August 4, 1956.

JACK D. H. HAYS
United States Attorney
for the District of Arizona

ROBERT S. MURLLESS
Assistant United States Attorney
204 U. S. Court House
Phoenix, Arizona

Attorneys for Appellee

Mailed copy hereof this ..... day
of August, 1956, to Counsel of Record
for Appellant.